

STATE OF MICHIGAN
COURT OF APPEALS

TERRELL MARKS,

Plaintiff-Appellant,

v

DUAYNE CHILDRESS,

Defendant-Appellee.

UNPUBLISHED

December 30, 1997

No. 192638

Wayne Circuit Court

LC No. 95-505940-NO

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right the dismissal of his negligence action on the ground that the action was barred by the wrongful conduct rule. We reverse.

Plaintiff stole a handgun from a car and gave it to a friend, who immediately hid it in Steve Grover's automobile. Approximately one month after the gun was stolen, plaintiff, Grover, and defendant went to another friend's house after school. Plaintiff was uncertain but believed that defendant carried the gun from Grover's car into the house. Plaintiff testified at his deposition that defendant was pointing the gun at people and joking around with the gun. Defendant pointed the gun at plaintiff's groin and head at close range, saying "I should shoot you," but plaintiff believed that defendant was just joking. Grover told defendant that the gun was loaded, but defendant cocked the gun anyway. After a while, defendant stepped back and tried to uncock the gun, but it discharged, striking plaintiff in the arm and body. At his deposition,¹ defendant denied that anyone told him that the gun was loaded. According to defendant, the boys were tossing the gun around like a hot potato. Defendant also testified that the gun accidentally discharged when he tried to open the gun and check for bullets.

Plaintiff sued defendant based upon defendant's negligent handling of the gun and sought damages for injuries plaintiff sustained to his arm, leg, spine, and kidney. Defendant filed a motion for summary disposition, arguing that plaintiff's complaint should be dismissed because plaintiff should not

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

benefit from his own illegal act of stealing the same gun that was used to shoot him. The trial court accepted defendant's argument that the wrongful conduct rule precluded recovery. We disagree.

For the wrongful conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Orzel v Scott Drug Co*, 449 Mich 550, 564; 537 NW2d 208 (1995). In *Orzel*, the Court, quoting 1A CJS, Actions, § 30, pp 388-389, stated:

The maintenance of an action, under the general rule, may be refused or precluded only where the illegality or immorality with which plaintiff is chargeable has a causative connection with the particular transaction out of which the alleged cause of action asserted arose.

The fact that a person has been guilty of a wrong in one particular does not make him an outlaw or forfeit his right to legal protection and relief in regard to others, and does not preclude him from maintaining an action based on a separate transaction, as, where the original wrongdoing is consummated, and unrelated to the later and independent wrongdoing of the defendant

An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish his cause of action without showing or having to rely upon such act or transaction although the act or transaction may be important as explanatory of other facts in the case.

Accordingly, an exception to the wrongful conduct rule exists where the wrongful conduct is only collaterally or incidentally connected to the cause of action so that the plaintiff may prove his case without relying on the wrongful conduct. *Id.* at 564. Similarly, an exception to the rule exists where the illegal conduct is merely a condition and not a contributing cause of the injury and where the plaintiff's illegal conduct does not give rise to both his cause of action and his criminal responsibility. *Id.* at 565-566; see also *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1975) (recovery not barred where the plaintiff was injured when she fell into a hole located on the premises of a church where she had just attended an illegal bingo game).

Here, although the details are disputed, both parties agree that plaintiff stole the gun and gave it to a friend, who eventually allowed defendant to handle it. Regardless of which version of events is believed, the wrongful conduct rule does not apply in this case. Plaintiff need not rely on the theft of the gun in order to prevail on his negligence claim. Being shot is a risk of being around any weapon, not a risk that either arises from or is increased by the gun's stolen status. Similarly, the cause of action arose from the shooting and not from the theft of the weapon over a month earlier. Plaintiff does not seek to profit from the theft of the weapon nor to recover damages for injuries suffered while he was stealing the weapon. As in *Manning*, *supra*, the theft was only collaterally or incidentally connected to plaintiff's negligence action and plaintiff could theoretically prevail on his claim without ever mentioning from where the gun came. In other words, the gun's stolen status was only a condition and not a contributing

cause of plaintiff's injury and, although the theft gives rise to plaintiff's criminal responsibility, it did not give rise to

his cause of action against defendant. Hence, the trial court erred in determining that plaintiff's cause of action was barred on the basis of illegal conduct.

Reversed and remanded.

/s/ E. Thomas Fitzgerald

/s/ Joseph B. Sullivan

¹ Unfortunately, the parties failed to provide the trial court with a complete copy of defendant's deposition but they have provided copies to this Court attached to their respective appellate briefs. Because the trial court did not have defendant's entire deposition available to review, we will not permit the parties to expand the record on appeal. Therefore, we will only rely on defendant's deposition excerpt found in the lower court record.